

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 August 2024

Public Authority: The Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant has requested the records of a named serviceperson. The Ministry of Defence ("the MoD") provided some information but withheld some details under section 40(2) and 41 of the FOIA.
2. The Commissioner's decision is that the MoD were entitled to rely on sections 40(2) and 41 to withhold the information.
3. The Commissioner does not require further steps.

Request and response

4. On 23 April 2023, the complainant wrote to the MoD and requested the records of a named serviceperson, stating they were the serviceperson's grandchild. At internal review, the complainant widened their request, asking for any records held under another name they believed their grandfather to have used.
5. The MoD responded on 9 October 2023. It provided most of the information, but stated some was exempt under sections 40 (personal data) and 41 (information provided in confidence) of the FOIA. The MoD maintained this position at internal review.

Reasons for decision

Section 40(2) – personal data

6. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
7. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
8. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
9. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

10. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
11. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
12. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
13. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
14. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information does relate to a potentially living individual.

15. The MoD have advised the withheld information also relates to the next of kin of the serviceperson, who they have not been able to trace. The MoD's policy is to assume an individual is still living if they are under 116 years of age, meaning this would be considered personal data.
16. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
17. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
18. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

19. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

20. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
21. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

22. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"¹.

¹ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides

23. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
24. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

25. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
26. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
27. The Commissioner notes the requester has stated they are researching their family history, and this is the reason for the request. This is a personal but nonetheless legitimate interest.

Is disclosure necessary?

28. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under
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that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

29. The MoD has provided a selection of links and information sources under section 16 (advice and assistance) of the FOIA, but the Commissioner acknowledges the records will likely contain information not available through other sources.
30. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

31. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
32. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
33. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
34. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
35. The Commissioner considers it important to remember that a disclosure under FOIA is a disclosure to the world, not just to a private individual, and individuals would have a reasonable expectation that personnel files would not be released into the public domain, particularly without

consultation. As previously mentioned, the MoD have said they have not been able to trace the next of kin, and cannot discuss the potential outcomes of disclosure with them.

36. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
37. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

Section 41 – information provided in confidence

38. Information is exempt from disclosure if it was obtained by the public authority from any other person and the disclosure of the information to the public would constitute a breach of confidence actionable by that or any other person.
39. The withheld information consists of the serviceperson's trade or occupation, any criminal offences they may have, their national insurance number, their military activity and their religious affiliation.
40. The Commissioner is satisfied that the withheld information is therefore information obtained from the serviceperson and this element of the exemption is met. In particular, some of this information qualifies as special category data, and therefore merits a particular level of protection.
41. When determining whether disclosure would constitute an actionable breach of confidence it is necessary to consider whether the information has the necessary quality of confidence and whether it was imparted in circumstances importing an obligation of confidence. Then, whether disclosure would be an unauthorised use of the information to the detriment of the confider.
42. The Commissioner is satisfied that withheld information is information that has the necessary quality of confidence. It is not trivial or otherwise accessible to the general public. The Commissioner also considers that servicepeople would have the reasonable expectation that information provided to the MoD would not generally be disclosed to the wider public, and disclosure could constitute an actionable breach of confidence.
43. The Commissioner acknowledges that the complainant is looking to research their family history and does not intend to make this

information more widely available to the public. However, the MoD have advised it has not been able to conclusively link the requester to the named serviceperson as a descendant, nor prove the serviceperson is indeed deceased.

44. Furthermore, as before, a disclosure under FOIA is a disclosure to the world, not solely to a private individual. In terms of a disclosure under FOIA, the Commissioner considers that there is a particularly strong public interest in ensuring that the confidentiality of the MoD's personnel records is maintained.
45. For section 41 to apply, any potential breach of confidence must be actionable. This means that there must be a good chance of such an action succeeding because the public authority wouldn't have a valid defence to such a claim.
46. A public authority can defend itself against an action for a breach of confidence if it can establish a public interest defence – that the breach of confidence was necessary in the public interest. The Commissioner isn't satisfied that such a defence would be viable here
47. In the absence of a public interest defence, the Commissioner is therefore satisfied that it would be an actionable breach of confidence for the MOD to disclose the requested information under FOIA and, as such section 41(1) applies.

Right of appeal

48. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Joanna Marshall
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